IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 61842-3-I
Appellant,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JAMES ARTIS CASON,	)	
	)	
Respondent.	)	FILED: August 24, 2009
	)	

Schindler, C.J. — Any fact that results in more serious punishment for the charged crime is an essential element that must be alleged in the information and proved beyond a reasonable doubt. James Artis Cason relies on State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004), to argue that his convictions for two counts of Violation of the Uniform Controlled Substances Act (VUCSA), delivery of cocaine, in violation of RCW 69.50.401(1) and (2)(a), must be reversed because the "to convict" jury instruction did not include as an essential element that the State had to prove the controlled substance was cocaine. But unlike in Goodman, because Cason could only be subject to one penalty as charged under RCW 69.50.401(1) and (2)(a), the identity of the type of drug delivered was not an essential element that had to be included in the "to convict" instruction. In the alternative, Cason argues that his

convictions must be reversed because RCW 2.36.055 and the King County Local General Rule (KCLGR) 18 that allows the jury venire to be drawn from a jury assignment area rather than King County as a whole, violates article IV, section 22 and article I, sections 5 and 6 of the Washington State Constitution. However, the Washington State Supreme Court in State v. Lanciloti, 165 Wn.2d 661, 663, 201 P.3d 323 (2009), recently considered and rejected the same argument. We affirm.

FACTS

On January 27, 2007, a confidential informant (the CI) and three King County Detectives participated in a controlled narcotics buy operation. The CI went to Cason's apartment to buy cocaine. The CI told Cason that she wanted $40 worth of crack cocaine. Cason said that he did not have it on him and left the apartment. A few minutes later, Cason returned and handed the CI four rocks of crack cocaine.

On February 2, the Detectives and the CI went to Cason's apartment a second time to purchase cocaine. After the CI asked Cason for $40 worth of crack cocaine, he left and walked across the street to another apartment building. About five minutes later, Cason returned and gave the CI four rocks of crack cocaine. The CI paid Cason $40 for the four rocks of crack cocaine.

The State charged Cason with two counts of VUCSA delivery of cocaine in violation of RCW 69.50.401(1) and (2)(a). As to Count I, the information alleged:

> [T]he defendant JAMES ARTIS CASON in King County, Washington, on or about January 27, 2007, unlawfully and feloniously did deliver Cocaine, a controlled substance and a narcotic drug, to another, and did know it was a controlled substance; Contrary to RCW 69.50.401(1), (2)(a), and against the

peace and dignity of the State of Washington.

Except for the date of February 2, 2007, the allegations for Count II were identical.

After jury selection, Cason made a motion for a mistrial. Cason argued that the jury venire violated his constitutional rights because it was not drawn from the entire County. The court denied the motion.

Three detectives and the CI testified at trial about the purchases of crack cocaine from Cason on January 27 and February 2. A Washington State Crime Laboratory forensic scientist testified that the substance Cason sold to the CI was cocaine.

The defense theory at trial was that the CI was not credible. Cason testified and denied that he sold cocaine to the CI. Cason said that the CI had crack cocaine with her when she came to his apartment on January 27 and February 2. Cason also said that the CI asked to use the bathroom and he let her use his pipe to smoke the cocaine that she had brought with her.

Cason did not object to the proposed jury instructions, including the "to convict" instructions. One of the instructions also states, "Cocaine is a controlled substance."

In closing, the prosecutor identified the substance that Cason delivered as cocaine. Cason's attorney did not dispute that the substance was cocaine. The attorney argued that there was some question about "the handing over of the cocaine."

The jury found Cason guilty of "VUCSA – Delivery of a Controlled Substance

as charged in Count I and Count II." The judgment and sentence also reflects that Cason was found guilty by the jury of two counts of VUCSA delivery of cocaine in violation of RCW 69.50.401(1) and (2)(a). With an offender score of 8, the court imposed a low end concurrent sentence of 60 months plus one day.

ANALYSIS

The "To Convict" Instruction

For the first time on appeal, Cason contends that the "to convict" jury instruction violates his right to due process because it omitted an essential element of the crime by failing to allege that the controlled substance was cocaine.[1]

The omission of an element in the "to convict" instruction is an error of constitutional magnitude that can be raised for the first time on appeal. State v Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). We review the adequacy of "to convict" jury instruction de novo. Mills, 154 Wn.2d at 7. We cannot rely "on other instructions to supply the element missing from the 'to convict' instruction." State v. DeRyke, 149

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[1] The "to convict" instruction states:

> To convict the defendant of the crime of delivery of a controlled substance, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:
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> (1) That on or about January 27, 2007, the defendant delivered a controlled substance;
>
> (2) That the defendant knew that the substance delivered was a controlled substance; and
>
> (3) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count I.

The "to convict" instruction for "Count II" was identical except that the date was "February 2, 2007. In the remainder of the opinion, we refer to both "to convict" instructions in the singular.

Wn.2d 906, 910, 73 P.3d 1000 (2003).

The State has the burden of proving each essential element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). Consequently, the "to convict" instruction must contain every element of the crime charged. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997).

In Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."[2] In Ring v. Arizona, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Court held that the facts necessary to increase a sentence are "'the functional equivalent of an element . . .'" of the charged offense.

In State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004), the Washington Supreme Court addressed the question of whether the identity of a controlled substance is an essential element of possession with the intent to deliver a control substance in violation of former RCW 69.50.401(a) (1998). Goodman, 150 Wn.2d at 779. The defendant in Goodman, asserted that the amended information was inadequate because it did not clearly identify the specific controlled substance. Goodman, 150 Wn.2d at 784.

[2] In Blakely v. Washington, 542 U.S. 296, 303, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the Court clarified Apprendi and held that the statutory maximum is the maximum sentence a judge can impose "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."

The controlling statute in Goodman, former RCW 69.50.401(a), provided that "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." The following subsections of the statute, former RCW 69.50.401(a) (i) to (v), imposed a term of confinement ranging from ten years to five years depending on the identity of the control substance. The penalties for possession of a controlled substance included ten years for "a controlled substance classified in Schedule I or II which is a narcotic drug" under former RCW 69.50.401(a)(1)(i); ten years for methamphetamine under subsection (ii); and five years under subsections (iii), (iv), and (v) for "any other controlled substance classified in Schedule I, II, or III."[3]

[3] Former RCW 69.50.401(a) provides:

> (a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.
> (1) Any person who violates this section with respect to:
> (i) a controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam classified in Schedule IV, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;
> (ii) amphetamine or methamphetamine, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine. The fine moneys deposited with the law enforcement agency must be used for such clean-up costs;
> (iii) any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined

Relying on Apprendi, the Washington Supreme Court held that because the statutory maximum sentence that the defendant faced under former RCW 69.50.401(a) would increase depending on the controlled substance that he possessed, the identity of the controlled substance was a fact that the State had to allege and prove beyond a reasonable doubt. Goodman, 150 Wn.2d 786.[4]

In State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007), the court stated that the holding in Goodman also applies to the "to convict" jury instruction. Williams, 162 Wn.2d at 190. However, because felony possession of any type of a controlled substance would have resulted in the same penalty for bail jumping, the court in Williams rejected the argument that by the "to convict" instruction was constitutionally defective because it did not identify the controlled substance. Williams, 162 Wn.2d at 191.

In 2003, the legislature amended RCW 69.50.401(a). The purpose of the amendment was "to clarify and simplify the identification and referencing of crimes" by identifying the crime as either a "class B felony" or a "class C felony" and changing the numbering in the statute. Laws of 2003, ch. 53, § 1.

Cason was charged and convicted of VUCSA delivery of a controlled

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not more than ten thousand dollars, or both;
(iv) a substance classified in Schedule IV, except flunitrazepam, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both;
(v) a substance classified in Schedule V, is guilty of a crime and upon conviction may be imprisoned for not more than five years, fined not more than ten thousand dollars, or both.

[4] Nonetheless, because the amended information stated that the substance was "meth," instead of "methamphetamine," the court affirmed. Goodman, 150 Wn.2d at 790.

substance under the current version of RCW 69.50.401, specifically, RCW 69.50.401(1), and (2)(a). RCW 69.50.401(1) provides that "it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance."

RCW 69.50.401(2)(a) states:

> Any person who violates this section with respect to:
> (a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years . . . .

Here, as in Williams, because Cason could only be subject to a penalty of ten years if convicted as charged under RCW 69.50.401(1) and (2)(a), the identity of the controlled substance was not an essential element of the crime that had to be set forth in the "to convict" jury instruction and proved beyond a reasonable doubt.[5]

Jury Venire

Cason also contends that because RCW 2.36.055 and KCLGR 18 allowed the jury venire to be drawn from the North jury assignment area rather than King County as a whole, his rights under art. IV, §§ 5 and 6, and art. I, § 22 of the Washington State Constitution were violated.

These arguments are controlled by the Washington Supreme Court's decision in Lanciloti, 165 Wn.2d at 663. RCW 2.36.055 and KCLGR 18 allow King County to divide the jury source list "into jury assignment areas that consist of registered voters and licensed drivers and identicard holders residing in each jury assignment area." Lanciloti, 165 Wn.2d at 667. In Lanciloti, the court held that "the legislature was within its power to authorize counties with two superior courthouses to divide

[5] Cason also cites State v. Evans, 129 Wn. App. 211, 118 P.3d 419 (2005), rev'd on other grounds, 159 Wn.2d 402, 150 P.3d 105 (2007), to argue that if the identity of the substance changes the standard range, it is an element that must be submitted to the jury. But as in Goodman, the defendant in Evans was charged under former RCW 69.50.401(a).

themselves into two districts." Lanciloti, 165 Wn.2d at 671.

Cason also argues that RCW 2.36.055 and KCLGR 18 violate his Sixth Amendment right to a jury venire representing a fair cross section of the community. The Sixth Amendment prohibits the systemic exclusion of "'distinctive groups'" from the jury pool. Duren v. Missouri, 439 U.S. 357, 363-64, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979). But, as in Lanciloti, Cason "has not carried his burden of showing that these demographic differences amounted to a systemic exclusion of a distinctive group." Lanciloti, 165 Wn.2d at 672. Because Cason presented no evidence showing the jury venire did not represent a fair cross section of the community, we decline to consider this claim. Lanciloti, 165 Wn.2d at 671-72.

We affirm.

Schindler, C.J.

WE CONCUR:

Dwyer, A.C.J.

Ajid, J.